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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Appellant,

v.

ROGER SUNDBERG,

Defendant and Respondent.

B240381

(Los Angeles County
Super. Ct. No. BH008183)

APPEAL from an order of the Superior Court of Los Angeles County.

Patricia M. Schnegg, Judge. Reversed.

Kamala D. Harris, Attorney General, Jennifer A. Neill, Senior Assistant Attorney General, Julie A. Malone and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Appellant.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Respondent.

Appellant Terri Gonzalez, Warden of the California Men's Colony, appeals from the Los Angeles County Superior Court's March 20, 2012 order granting life prisoner Roger Sundberg's petition for writ of habeas corpus. The order reverses the decision of the Board of Parole Hearings denying parole to Mr. Sundberg.

Appellant contends that the superior court erred in reversing the Parole Board's decision because some evidence supports the Board's decision to deny parole to Mr. Sundberg. We agree, and reverse the superior court's order.

Background

Sundberg pled guilty to second degree murder in the 1987 killing of his neighbor, Steven Summers. Mr. Sundberg had no prior criminal history.

The probation report shows that Summers was estranged from his wife Pam. Pam became involved with Mr. Sundberg. Pam had a restraining order against Summers "because he was abusive to her physically. The victim was desperate for a place to stay so the victim's wife allowed him to stay in the garage at her residence. . . . [T]his infuriated the defendant. On the night of the crime he became incensed because he saw the victim moving about the garage which was located next to his residence and back and forth into the house. His rage built to the point where he walked over and picked up a pistol in his home and walked out of his house to the driveway next door where he shot the victim four times. Victim managed to get into his house and staggered toward his bedroom with the defendant following behind him with the pistol and occasionally striking the victim. At this point the victim's son grabbed a plastic baseball bat and tried to intercede but was unable to do anything more than irritate the defendant. Defendant followed the victim into the bathroom where the victim fell into the bathtub. After some time of arguing defendant shot the victim twice in the head in the bathtub with the victim's son looking on." Mr. Sundberg then shot himself in the head.

Mr. Sundberg had an exemplary record in prison. He was discipline free throughout his prison term, had an excellent work history, and had participated in various self-help activities and workshops such as Alcoholics Anonymous, Alternatives to

Violence, Fathers Behind Bars, Mediation Studies, Transforming Ourselves, Empathy, and Communications. In his most recent psychological evaluation, Mr. Sundberg ranked in the low range for psychopathy, violent recidivism, and general recidivism and was found to be a low overall risk for future violence.

Mr. Sundberg's minimum parole eligibility date was in 1998. At the time of his 2010 parole consideration hearing he had served 22 years in prison and was 53 years old. The Board at that hearing found Sundberg unsuitable for parole and issued a three year denial of parole.

Discussion

Appellant contends that some evidence supports the Panel's decision to deny Sundberg parole, and so the decision of the superior court reversing the Panel must be reversed. We agree.

The trial court's findings were based solely upon documentary evidence. Accordingly, we independently review the record. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 677.)

In determining whether to release a life inmate to the public, the parole authority considers "[a]ll relevant, reliable information available" and any "information which bears on the prisoner's suitability for release." (Cal. Code Regs., tit. 15, § 2402, subd. (b).)

"[W]hen a court reviews a decision of the Board or the Governor [denying parole], the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings. [Citations.]" (*In re Lawrence* (2008) 44 Cal.4th 1181, 1212.) "This standard is unquestionably deferential, but certainly is not toothless." (*Id.* at p. 1210.)

"The 'some evidence' standard is intended to guard against arbitrary parole decisions." (*In re Shaputis* (2011) 53 Cal.4th 192, 215 (hereafter *Shaputis II*).) A

reviewing court must uphold the Board's decision "unless it is arbitrary or procedurally flawed." (*Id.* at p. 221.)

1. Commitment offense

There is some evidence to support the Panel's finding that Mr. Sundberg's commitment offense was especially heinous, atrocious, or cruel. The record shows that Mr. Sundberg shot the victim execution-style, the offense was brutal and the motive trivial. Further, the murder was committed in front of the victim's son, and traumatized him.

The Board may base a denial of parole upon the circumstances of the offense only if the facts are probative of the "ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety." (*In re Lawrence, supra*, 44 Cal.4th at p. 1221.) Where, as here, the life prisoner has served more than his suggested base term, the circumstances of the life offense will rarely support a finding of unsuitability for parole. (*Id.* at p. 1211.)

2. Lack of insight

An inmate's failure to gain insight into his crime despite years of rehabilitative programming may indicate a current risk of danger. (See *In re Shaputis* (2008) 44 Cal.4th 1241, 1260.)

"The regulations do not use the term 'insight,' but they direct the Board to consider the inmate's 'past and present attitude toward the crime' (Regs., § 2402, subd. (b)) and 'the presence of remorse,' expressly including indications that the inmate 'understands the nature and magnitude of the offense' (Regs., § 2402, subd. (d)(3)). These factors fit comfortably within the descriptive category of 'insight.'" (*Shaputis II, supra*, 53 Cal.4th at p. 218.)

The Board found that Sundberg had not come to grips with his commitment offense. They stated, "He's justifying, being evasive and minimizing his actions." The Board added, "And what's more important is that he doesn't have any remorse. In his

statement here today, he didn't talk about Ms. Summers and the effects his crime had upon his victim. He did not talk about that eight-year-old boy who lost his father in gunfire and violence." The Board agreed with a previous Panel that it was "not convinced that [Sundberg] truly understand[s] the nature and magnitude of the offense."

The Board's finding was based in large part on Mr. Sundberg's version of the commitment offense. At Mr. Sundberg's request, the Board relied on Mr. Sundberg's statement in his 2010 psychological evaluation for his version of the crime.

That statement is as follows:

"When my wife Robin was pregnant the house was sold and we had to move. Pam and Steve Summers lived across the driveway at our new residence. Pam became friends with my wife Robin. She complained of Steve abusing her and her child. She confided in me. I thought of Steve as an evil person because of his abuse of his wife, which included emotional abuse and he occasionally hit her. She said that one time he tied her up and tortured her. I stopped seeing Steve as an ordinary person. I depersonalized him like they train you to do in the military. That's the basis of why I was able to kill him. I put him in a category of an 'it' instead of a person. Steve and I had conflict because Pam wanted Steve to leave and he thought Pam and I were having an affair. I made the mistake of saying to Steve 'if you care for her you'll go and leave her alone.' That infuriated him and he constantly made hostile remarks. Steve was forced out when Pam obtained the restraining order. He would come back and he was arrested a couple of times for violating the order. Then Pam stopped calling the police because he brought her food or speed. The Probation Officer's Report says that she allowed him to live in the garage. I'm not sure about that. Steve said that he would kill Pam or take the child if she divorced him. I considered him to be dangerous because of the threats that he was making. I felt a need to protect Pam, my wife and my children. I wouldn't let my children play outside. I was in an episode of major depression with suicidal thinking at that time. I called the suicide prevention hotline because my wife had restarted a relationship with a prior lover. I was jealous of him. I was drinking to self medicate my depression. That night I was drinking with Robin. I drank malt liquor and maybe had

wine earlier. Robin and I had a big argument. She said 'I don't care anymore.' That wiped me out emotionally because my life revolved around her. I became really suicidal. I had said that 'if I suicide I'm going to kill Steve first.' That thought became pathological. I looked out the door and saw Steve go into the garage. I went into a rage. I had a gun for protection. Steve also had a gun. I got the gun and went and opened the door. He jumped up and came at me. I started shooting. I was shooting because of anger and fear. I was so angry I saw red. It was rage, and all of my feelings went into that rage. I had built up anger toward Steve based on his threats and his treatment of Pam. I also feared him. But much of my rage was due to the hurt I felt with Robin. I couldn't hurt her so I displaced my anger toward Steve. I was thinking at that time that I was protecting my wife, Pam and my family. But there is no justification for killing a person. I fired five times outside and Steve ran into the house. I chased him into the bathroom. We struggled some more and hit each other more. He fell and it looked like he'd died. I put the gun to my head and shot and then I blacked out. I woke up in the hospital."

a. Evasion and minimization

There is some evidence to support the Board's finding that appellant was being evasive and minimizing his actions. Mr. Sundberg elected to rely on an account of the crime which he provided in his 2010 psychological evaluation. In that version of the offense, Mr. Sundberg stated, "I fired five times outside and Steve ran into the house. I chased him into the bathroom. We struggled some more and hit each other more. He fell and it looked like he died." Mr. Sundberg then shot himself. As the Board recognized at the hearing and the psychologist who prepared Mr. Sundberg's evaluation pointed out, "Mr. Sundberg neglected to mention that he shot the victim twice in the head while they were in the bathroom." He also neglected to mention that the victim's eight-year-old son was present when the shots were fired in the bathroom. These are major omissions which can reasonably be characterized as evasive and understood as attempts to minimize Mr. Sundberg's conduct. Thus, the trial court was mistaken in finding that there was no evidence to support the Board's finding of minimization.

b. Justification

There is also some evidence to support the Board's finding that appellant was still justifying his actions. In his account of the commitment offense, Mr. Sundberg discussed the flaws of the victim at some length, stating that the victim's wife Pam complained of the victim "abusing her and her child, . . . which included emotional abuse and he occasionally hit her. She said that one time he tied her up and tortured her." Mr. Sundberg told the victim that if he cared about Pam, he would leave her alone. According to Mr. Sundberg, "[t]hat infuriated him and he constantly made hostile remarks." Mr. Sundberg stated, "I considered him to be dangerous because of the threats that he was making. I felt a need to protect Pam, my wife and my children." Mr. Sundberg stated, "I was shooting because of anger and fear."

The trial court found that Mr. Sundberg was simply explaining his state of mind at the time of the crime, and the fact that Mr. Sundberg stated that "there is no justification for killing a person" meant that Mr. Sundberg was no longer claiming that he was protecting Pam or his own family. This is a reasonable understanding of Mr. Sundberg's statements.

The Board's understanding of Mr. Sundberg's statement was also reasonable. During Mr. Sundberg's statement, when he mentioned many of his feelings at the time of the crime, he also offered an explanation of those feelings. For example, he stated that he felt anger toward the victim, but added that "much of my rage was due to the hurt I felt with [my wife]. I couldn't hurt her so I displaced my anger toward [the victim]." He offered no similar explanation for his statement about needing to protect Pam and his own family. As is clear from every account of the crime, there was no immediate threat to their safety. Mr. Sundberg offered no explanation of the disconnect between his feelings and reality. Thus, it was reasonable for the Board to understand Mr. Sundberg's statement that he felt a need to protect Pam and his family to be a feeling that he still harbored.

A further indication that the Board's understanding is reasonable is found in the analysis of the psychologist who interviewed Mr. Sundberg, and had an opportunity to

observe him as he described the commitment offense. That psychologist found that "[t]here was evidence of a degree of failure to accept responsibility for his actions as indicated by his description of the homicide as a response to the threats that the victim presented toward his family."

The Board's understanding of the statement was reasonable. "The 'some evidence' standard does not permit a reviewing court to reject the Board's reasonable evaluation of the evidence and impose its own judgment." (*Shaputis II, supra*, 53 Cal.4th at p. 199.) Accordingly, we accept the Board's understanding of the statement.

c. Lack of remorse

There is some evidence to support the Board's finding that Mr. Sundberg lacked genuine remorse about the effects of the crime on the victim's wife and child. At the hearing, Mr. Sundberg stated, "And I realize that what I did caused Pam and Jimmy Summers trauma suffering and it caused my wife and children suffering, and a web of suffering that spread out from [the victim's] family and my family."

The trial court characterized this statement as one of remorse. Realization is not remorse. Remorse involves some feeling or guilt, shame or regret and Mr. Sundberg did not vocalize any such feelings in connection with this statement. Further, even if an acknowledgement of trauma and suffering could be understood as an expression of remorse, Mr. Sundberg's acknowledgement is a fairly generic one, referring generally to "trauma" and "suffering." There is no acknowledgement of the specific trauma or suffering that must have been caused to the victim's son by Mr. Sundberg's decision to shoot the victim in the head in the presence of the victim's son, after the boy had tried to defend his father with his own toy baseball bat. This is a significant omission.

The trial court is correct that the psychological evaluation states that Mr. Sundberg has expressed remorse for the victim and his family. The psychological evaluation states that during the interview Mr. Sundberg "expressed remorse for killing [the victim] and added the he has experienced a great deal of guilt and shame. He noted that he traumatized the victim's wife and son." The trial court fails to note that the evaluation

also states that "Although [Mr. Sundberg] has expressed feelings of remorse and guilt in response to the offense, these are diminished by his tendency to justify his actions as an attempt to protect those that he loved."

Even assuming that the trial court is correct there is some evidence that could be understood as expressing remorse, that evidence could also reasonably be understood as failing to genuinely express remorse. Since the Board's understanding of the evidence is reasonable, we accept that understanding. (*Shaputis II, supra*, 53 Cal.4th at p. 199.)

3. Current dangerousness

There is some evidence to support the Board's finding that Mr. Sundberg lacked adequate insight into the commitment offense and did not feel genuine remorse for the victim's wife and son. Lack of insight supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness. (*Shaputis II, supra*, 53 Cal.4th at p. 219.)

That is the case here. A major area where Mr. Sundberg lacks insight is his attitude toward the victim's son. Mr. Sundberg's most recent account of the crime does not mention the son's presence during the crime at all and indicates that he has depersonalized the son. The victim's son is not on the list of people Mr. Sundberg thought he needed to protect. Mr. Sundberg has not shown any understanding of the harm done to the son by the circumstances of the murder, and has expressed at most cursory remorse for the unspecified suffering and trauma he caused the son.

As Mr. Sundberg has acknowledged, it was his depersonalization of the victim which enabled him to kill the victim. Mr. Sundberg's lack of awareness that he has depersonalized another person is troubling and does indicate some current dangerousness. Thus, the Board's decision that Mr. Sundberg poses an unreasonable risk of danger to the public is supported by some evidence.

Disposition

The trial court's order is reversed.

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ARMSTRONG, Acting P. J.

I concur:

KRIEGLER, J.

MOSK, J., Dissenting

I dissent.

The criterion is current dangerousness. I do not see how parsing Mr. Sundberg's statements to his psychologist bears on that. Mr. Sundberg was trying to explain to the psychologist why he did what he did. In other words, he was trying to express his "insight" on why he committed the crime. That explanation has nothing to do with remorse or lack of remorse. He was not asked about his remorse. His "insight" should be a positive element under *In re Shaputis* (2008) 44 Cal.4th 1241, 1260. He did not kill the victim for no reason. He did so because of his perception of events then. And, he expressed remorse. Parenthetically, "an inmate's refusal to agree with the prosecution's version of the crime does not support a finding of lack of insight." (*In re Pugh* (2012) 205 Cal.App.4th 260, 269.)

I cannot see reading into his statement some "depersonalization" of anyone. Under some circumstances, justification for a criminal act reflects current dangerousness. But trying to interpret words in a psychiatric setting like interpreting ambiguities in a contract seems misplaced. Soon, prisoners will figure out what to say to the Parole Board without regard to their true feelings. In short, they will provide the most acceptable version of insight rather than their true insight.

Normally, the Parole Board should be the one to make the determination. Courts should rarely be involved. But I have reservations about the analysis employed here. Mr. Sundberg has a perfect record in prison. Parole is a system to encourage rehabilitation. Perhaps one who commits such a heinous crime as committed by Mr. Sundberg should remain in prison for a lengthier period without regard to a determination of current dangerousness, but that is not the law. And perhaps the crime itself might indicate current dangerousness, but the Supreme Court has said that immutable factors

will rarely result in a denial of parole. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1211.) If the Board considered the crime itself to indicate current dangerousness and that more years in prison would dissipate that dangerousness, then it should say so.

I believe the trial court here rendered an appropriate opinion. I would affirm the ruling.

MOSK, J.